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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 780

MARY CABALIK, Petitioner,

v.

JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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IN THE

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MARY CABALIK, Petitioner,

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JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

May it please the Court:

The petition of Mary Cabalik respectfully prays that a writ of certiorari be issued to the Supreme Court of Pennsylvania and shows to this Honorable Court:

I.

Summary Statement of Matters Involved.

The Pittsburgh-American Bank and Trust Company was the result of a merger of two corporations, both of which were incorporated prior to 1923 as "banks" under the Pennsylvania Act of 1876, P. L. 161, as amended by the Act of 1909, P. L. 412, (R., p. 4 a, 5 a). The resultant corporation, having complied with the

Pennsylvania Act of 1919, P. L. 1032, became a "bank and trust company" (R., p. 4 a).

The Secretary of Banking of the Commonwealth of Pennsylvania, as Receiver, took possession of the Pittsburgh-American Bank and Trust Company and levied a double liability assessment against the stockholders thereof, of which your Petitioner is one, in pursuance of a provision of Section 5 of the Act of 1876, *supra.*

The Secretary of Banking of the Commonwealth of Pennsylvania, as Receiver of the Pittsburgh-American Bank and Trust Company, instituted suit in assumpsit in the Court of Common Pleas of Allegheny County, Pennsylvania, against your Petitioner, as a stockholder, to enforce the double liability assessment. A Statutory Demurrer urging the equal protection clause of Section 1 of the XIV Amendment was filed (R., p. 20 a, 21 a) and subsequently overruled (R., p. 41 a). The position is that although the stockholders' double assessment provision of the 5th Section of the Banking Act of 1876 was constitutional when passed, a series of subsequent events has rendered an assessment unenforceable because it would now conflict with the equal protection clause of the XIV Amendment to the Federal Constitution.

A "bank", incorporated under the Banking Act of 1876, Section 5 of which provided for stockholders' double liability, by complying with the Act of 1919, P. L. 1032, became a "bank and trust company". A title insurance company was incorporated under the Corporation Act of 1874, P. L. 73, but without liability to its stockholders for a double assessment. Subsequent enabling legislation in Pennsylvania and particularly the Act of 1923, P. L. 173, has granted to a title insurance company, incorporated under the Corporation Act of 1874, all the powers possessed by a "bank and trust

company" incorporated under the Banking Act of 1876. Consequently, after 1923 the Pennsylvania Legislature permitted corporations incorporated under either act to operate as a "bank and trust company". The minimum capital structures by statute were identical,—Act of 1919, P. L. 1032. Separate classification, therefore, would rest upon no sound basis and be ineffective. To enforce a double liability assessment against the stockholders of the one when the stockholders of the other are immune from assessment would offend the equal protection clause aforementioned.

The Statutory Demurrer having been overruled, an Affidavit of Defense was then filed, again urging the Federal question (R., p. 45 a) and, upon motion, judgment was entered against your petitioner for want of a sufficient affidavit of defense by a Court *en Banc* on June 24, 1942 in the sum of $6348.50 (R., p. 50 a).

At the time of the bringing of this suit there were also filed suits against many other stockholders. In view of the number of suits, as well as for the purpose of expediting litigation, the Court *en Banc* considered only this particular action and continued the others (R., p. 25 a).

Your Petitioner appealed from the Final Order of the Court of Common Pleas of Allegheny County, Pennsylvania, to the Supreme Court of Pennsylvania, which affirmed the Lower Court and rendered a *Per Curiam* Opinion. The Federal question was decided against the Petitioner in the Opinion of the State Supreme Court (R., p. 54).

II.

Statement Disclosing Basis of Jurisdiction to Review.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 344).

The enforcement of the assessment provision of the following Pennsylvania Statute is involved: Section 5 of the Act of May 13, 1876, P. L. 161, as amended by the Act of 1909, P. L. 412. The relevant portion of Section 5 provides:

> "The shareholders of any corporation formed under this act, shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts and engagements of such corporation to the amount of their stock therein at the par value thereof in addition to the par value of such shares."

The judgment sought to be reviewed was rendered on January 5, 1943 by the Supreme Court of Pennsylvania, 346 Pa. 115; 29 A. 2nd, 678.

III.

Questions Presented.

1. Is the assessment made in accordance with Section 5 of the Pennsylvania Act of 1876, P. L. 161, as amended, against the shareholders of a bank and trust company incorporated under said Act of 1876, as amended, and acquiring trust powers by compliance with the Pennsylvania Act of 1919, P. L. 1032 unenforceable because it conflicts with the First Section of the XIV Amendment to the Constitution of the United States?

2. Cannot an Act of Legislature, constitutional when passed, due to a series of subsequent events be rendered unconstitutional and unenforceable because of the provisions of Section 1 of the XIV Amendment?

3. When determining the constitutional validity of a stockholder's double liability assessment, is not classification of a bank and trust company incorporated under the Pennsylvania Act of 1876, P. L. 161, into a different category from a bank and trust company incorporated under the Pennsylvania Act of 1874, P. L. 73, unreasonable, arbitrary, and of no effect because the basis supporting the classification has become irrelevant or artificial?

IV.

Reason Relied on for Allowance of Writ.

Both the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have decided and applied a Federal question of substance in a way not in accord with an applicable decision of your Honorable Court. In deciding the Federal question raised in this case, the Supreme Court of Pennsylvania adopted the decision of the Superior Court of Pennsylvania in *Harr, Secretary of Banking, Appellant, v. Boucher et al.*, 142 Pa. Superior Court 114; 15 A. 2nd, 699 (1940), (R., p. 55). The Superior Court decided on page 132 of 142 Pa. Superior Court in reference to both State and Federal Constitutions that "if an act was constitutional when passed, no passage of time, no series of events could render it an unconstitutional enactment at a later date." Consequently, decisions of both Appellate Courts in Pennsylvania have nullified in that State in a substantial degree the words "enforce" and "nor deny" in the First Section of the XIV Amendment and are in direct conflict with the decision of your Honorable Court in

Abie State Bank v. Bryan (1930), 282 U. S. 765, at 771; 75 L. Ed. 690, at 701, opinion by Chief Justice Hughes, which decided that an act providing for assessments against State Banks, litigated and declared constitutional under the terms of Section 1 of the XIV Amendment to the Federal Constitution at the time of passage of such act, could become unconstitutional under Section 1 of the XIV Amendment because of subsequent events, and was so declared.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket No. 156 March Term, 1942, John C. Bell, Jr., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company, v. Mary Cabalik, Appellant, and that said judgment of the Supreme Court of Pennsylvania may be reversed, and that your Petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your Petitioner will ever pray.

ALEXANDER J. BARRON,
GEORGE F. TAYLOR,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions Below.

The opinion and interlocutory order of the Court of Common Pleas of Allegheny County, Pennsylvania, sitting *en banc,* sur statutory demurrer (Dithrich and Richardson, JJ., opinion by Richardson, J.) was made a part of the Record (R., p. 26 a), March 25, 1942. It has not been reported.

The opinion and final order of the Court of Common Pleas of Allegheny County, Pennsylvania, sitting *en banc,* making rule absolute and entering judgment (W. Heber Dithrich, J.) was made part of the Record (R., p. 49 a) July 24, 1942. It has not been reported but adopted the opinion of Judge Richardson.

The opinion of the Supreme Court of Pennsylvania (Chief Justice William I. Schaffer, Justices George W. Maxey, James B. Drew, William B. Linn, Horace Stern, Marion D. Patterson and William M. Parker) written *Per Curiam,* was filed January 5, 1943 (R., p. 54). This opinion is reported in 346 Pa. 115; 29 A. 2nd, 678.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 344). The judgment of the Supreme Court of Pennsylvania was entered January 5, 1943 (R., p. 54), and decided the Federal question here raised. The question is substantial and the determination thereof is necessary for the proper decision of the case.

III.

Statement of the Case.

The material facts, with appropriate page references to the printed Record, are stated in the Petition, *supra,* pages 1 to 3 inclusive. A summary of argument appears in the index. The error assigned in the Court below, in so far as it relates to the applicability of the XIV Amendment to the Constitution of the United States, is intended here to be urged (R., p. 53). This assignment of error was to the final order of the Court of Common Pleas entered by Judge Dithrich on behalf of the Court, which order adopted the former opinion in the same case by Judge Richardson wherein the Federal question was decided (R., p. 35 a). The opinion of the Supreme Court of Pennsylvania decided the Federal question (R., p. 55).

IV.

Argument.

History of the conversion of a "trust company" incorporated under the Act of 1874, P. L. 73, into a "bank and trust company" and the conversion of a "bank" incorporated under the Act of 1876, P. L. 161, into a "bank and trust company."

A trust company was incorporated as a title insurance company under Section 2, Paragraph 19, and Section 29 of the Corporation Act of 1874, P. L. 73, 84, providing for incorporation for the purpose of "the insurance of owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and encumbrances". By supplementary enabling legislation, (*inter alia,* Acts of May 24, 1881, P. L. 22; May 9, 1889, P. L. 159; May 29, 1895, P. L. 127; June 1, 1907, P. L. 382) additional powers were granted,

among them the powers of a trust company and to receive deposits. The corporation prior to 1923 was then properly classified as a "trust company". However, by Act of May 9, 1923, P. L. 173, entitled, "Extending and enlarging the powers and rights of trust companies and banks organized and incorporated under the laws of the Commonwealth", corporations so organized under the Corporation Act of 1874 were authorized, *inter alia,* to discount notes, etc. Consequently, trust companies subsequent to 1923 also conducted the business of banks of deposit and discount, or, in other words, did a banking business; they possessed all the powers of a bank of deposit and discount. This was decided by Judge Stern when he was a Judge of a Common Pleas Court of Philadelphia County in the case of *Gordon, Secretary of Banking, v. Winneberger,* 16 D. & C. 505, affirmed in 310 Pa. 362. Consequently, after the year 1923 a "trust company" doing a banking business should be classified as a "bank and trust company".

A bank was incorporated under the General Banking Act of May 13, 1876, P. L. 161, as amended by the Act of May 3, 1909, P. L. 412. Banks incorporated under this Act were empowered to do only a banking business and should be termed "banks". However, a bank, providing it "had capital stock at least equal to the capital stock which trust companies" were required to have, could qualify under the Act of 1919, P. L. 1032, add the words "trust company" to its name and thereafter was empowered to act in any "fiduciary capacity in which trust companies organized under the laws of the Commonwealth had authority and were permitted under the laws to act." Consequently, a bank complying with the Act of 1919 became a "bank and trust company".

The status of relevant law in Pennsylvania relating to assessments of stockholders.

The Corporation Act of 1874 did not provide for the stockholders' double liability. A "trust company" and a "bank and trust company" organized under the Act of 1874 have been separately classified by the Pennsylvania Courts from a "bank" organized under the Act of 1876. The Supreme Court of Pennsylvania in 1933, in *Gordon v. Winneberger,* 310 Pa. 362; 165 A. 408, reaffirmed former cases to that effect and also decided that stockholders of a "bank and trust company" under the Act of 1874 were not liable for assessments.

The General Banking Act of 1876 provided for double liability. The Superior Court of Pennsylvania in Harr, Secretary of Banking, v. Boucher, *supra,* held that the stockholders of a "bank" incorporated under the Act of 1876 were liable to assessment.

It was stated by the Supreme Court of Pennsylvania that the assessment possesses "elements of a penalty": Gordon v. Winneberger, *supra,* at 366.

WHEN DETERMINING THE CONSTITUTIONAL VALIDITY OF A STOCKHOLDERS' DOUBLE LIABILITY ASSESSMENT, IS NOT CLASSIFICATION OF A BANK AND TRUST COMPANY INCORPORATED UNDER THE PENNSYLVANIA ACT OF 1876, P. L. 161, INTO A DIFFERENT CATEGORY FROM A BANK AND TRUST COMPANY INCORPORATED UNDER THE PENNSYLVANIA ACT OF 1874, P. L. 73, UNREASONABLE, ARBITRARY, AND OF NO EFFECT BECAUSE THE BASIS SUPPORTING THE CLASSIFICATION HAS BECOME IRRELEVANT OR ARTIFICIAL?

In Gordon v. Winneberger, *supra,* the State Supreme Court classified the banks incorporated under the two acts separately. The *Per Curiam* opinion of the Supreme

Court of Pennsylvania in the case at bar relied upon this case in respect to this question (R., p. 55).

On September 25, 1931, when the Secretary of Banking took possession of the institution in question, both types of corporations termed "bank and trust company" were authorized to conduct substantially the same type of business; the only difference was that a corporation organized under the Act of 1874 had authority to conduct an insurance guaranty business in addition to its banking powers. However, no law obliged the corporation to exercise the insurance guaranty powers it possessed. The minimum capital structure was identical,—see Act of 1919, P. L. 1032. It is apparent that the assessment is to strengthen the capital structure; corporations organized under the Act of 1874 having the right to exercise slightly more powers and having more business hazards than corporations under the Act of 1876 should necessitate the strengthened capital. There is, therefore, no substantial basis in fact for separate classifications and especially so when considering the subject of stockholders' assessments. There must be a substantial basis to support valid classifications: *Atchison, etc., R. Co. v. Matthews* (1898), 174 U. S. 96 at page 98 and at pages 104 and 105. A penalty cannot be inflicted upon one corporation and not upon another unless the penalty can be supported by the peculiarity supporting the classification. Otherwise, it is a discrimination and offends the equal protection clause of the XIV Amendment: *Atchison, Topeka, etc., Railroad v. Matthews, supra,* at 104; *Bayside Fish Flour Co. v. Gentry* (1935), 297 U. S. 421, 429; 80 L. ed. 772, 777; *New York Rapid Transit Corporation v. City of New York* (1937), 303 U. S. 571, 578; 82 L. ed. 1024, 1029.

CANNOT AN ACT OF LEGISLATION, CONSTITUTIONAL WHEN PASSED, DUE TO A SERIES OF SUBSEQUENT EVENTS, BE RENDERED UNCONSTITUTIONAL AND UNENFORCEABLE BECAUSE OF THE PROVISIONS OF SECTION 1 OF THE XIV AMENDMENT?

As is more fully stated on page 5 of the Petition, the Supreme Court of Pennsylvania in this case adopted and applied a rule formulated by the Superior Court that "if an act was constitutional when passed, no passage of time, no series of events could render it an unconstitutional enactment at a later date." While this reasoning may be true as to Article III, Section 7 of the State Constitution because of the sole word "pass" used in said section, it is not true as to the Federal Constitution because the XIV Amendment contains the words "make or enforce" and the words "nor deny". Said construction is contrary to the decision of this Court in Abie State Bank v. Bryan, *supra.*

The series of events rendering the assessment provision of the Act of 1876 violative of the XIV Amendment are the various enabling acts and particularly the passage of the Act of 1923, *supra,* affecting 1874 corporations and the Act of 1919 which was complied with by this 1876 corporation.

IS THE ASSESSMENT MADE IN ACCORDANCE WITH SECTION 5 OF THE PENNSYLVANIA ACT OF 1876, P. L. 161, AS AMENDED, AGAINST THE SHAREHOLDERS OF A BANK AND TRUST COMPANY INCORPORATED UNDER SAID ACT OF 1876, AS AMENDED, AND ACQUIRING TRUST POWERS BY COMPLIANCE WITH THE PENNSYLVANIA ACT OF 1919, P. L. 1032 UNENFORCEABLE BECAUSE IT CONFLICTS WITH THE FIRST SECTION OF THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Section 1 of the XIV Amendment to the United States Constitution reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics supplied)

It is reiterated that the series of events altering the enforcement of the assessment is: The Legislature of the Commonwealth of Pennsylvania by various enabling acts and particularly by the Act of 1923, which was enacted subsequent to the incorporation of this bank, has granted to 1874 corporation stockholders, immune from double liability assessment, all the powers, including the right to do a banking business, possessed by 1876 corporation stockholders who are specifically made subject to assessment. The Pittsburgh-American Bank and Trust Company, an 1876 corporation, by complying with the Act of 1919, was obliged to possess at least the minimum capital stock structure of an 1874 corporation. Consequently, the two species of corporations cannot be classified separately when considering the subject of shareholders' liability for double assessment. The assessment has been construed by the State Supreme Court as possessing the elements of a penalty.

The subsequent events, created solely by the Legislature, have rendered the enforcement of the assessment against shareholders of an 1876 bank and trust company unconstitutional under Section 1 of the XIV Amendment to the Federal Constitution because any enforcement thereof would be continuing in effect a law which is now abridging the privileges or immunities of the citizens of

the United States and is denying your Petitioner the equal protection of the laws.

A statutory penalty cannot be inflicted upon one group of stockholders and not upon another group of the same class; it is discrimination and offends the equal protection clause of the XIV Amendment: Atchison, Tokepa, etc. Railroad v. Matthews, *supra;* Bayside Fish Flour Co. v. Gentry, *supra.*

Wherefore, it is respectfully submitted that the petition for certiorari should be granted.

ALEXANDER J. BARRON,
GEORGE F. TAYLOR,
Counsel for Petitioner.

V.

Appendix.

PENNSYLVANIA STATUTES.

Act of 1919, P. L. 1032. Authorizing banking companies, incorporated and organized under the laws of the Commonwealth and having capital stock at least equal to the capital stock which trust companies are required by law to have, to act in any fiduciary capacity in which trust companies organized under the laws of the Commonwealth are empowered to act, and prescribing the method of acquiring such rights.

Section 1. Be it enacted, etc., That corporations organized or hereafter to be organized under the laws of the Commonwealth for carrying on the business of banking, and having capital stock at least equal to the capital stock which trust companies are required by law to have, may be granted, by special permit, the right and power to act as trustees, executor, administrator, registrar of stocks and bonds, guardian of estates, as-

signee, receiver, committee of estates of lunatics or habitual drunkards, or in any other fiduciary capacity in which trust companies organized under the laws of this Commonwealth have authority and are permitted to act.

Section 2. Such rights, powers, and privileges shall be exercised by State banking companies for and during the term of the charter of said banking companies and any renewal and extension thereof.

Section 3. Banking companies exercising any or all of the rights, powers, and privileges enumerated in section one of this act or included therein by reference to the laws regulating trust companies, shall keep all trust funds and trust investments separate and apart from the general assets of the bank, and shall keep a separate set of books and records, showing in proper detail all transactions engaged in under authority of this act. Such books and records shall be open to inspection, examination, and supervision by the State Bank Department, to the same extent as the other books, records, and assets of the banking company are by laws, existing or which may be hereafter enacted.

Section 4. Banking corporations exercising the rights and powers conferred by this act, shall not be required to execute the bond usually required of individuals, but shall have the power to execute any bond required by law when acting in any fiduciary capacity.

Section 5. In any case in which the laws of this Commonwealth require that a corporation acting in any fiduciary capacity shall take an oath or make an affidavit, the president, vice-president, cashier, or trust officer of such banking corporation may take the necessary oath or execute the necessary affidavit.

Section 6. Any banking company acquiring the additional rights and powers authorized by this act,

shall include in, or add to, its corporate name the words "Trust Company."

Section 7. Any banking company, incorporated under the laws of this Commonwealth, desiring to acquire and exercise the rights and powers authorized by this act, shall, by its board of directors, adopt a resolution, setting forth such desire, authorize its president and secretary to make application therefor under its corporate seal, and record such resolution on its minute book.

Section 8. The proper officers of the banking company shall file in the office of the Secretary of the Commonwealth a certificate in substantially the form following:

To His Excellency the Governor of the
Commonwealth of Pennsylvania, and
the Commissioner of Banking:

This is to certify, that the undersigned banking company, incorporated and organized under the laws of the Commonwealth, desires to obtain and exercise the rights and powers, under an act authorizing the grant by special permit to banking companies organized under the laws of the Commonwealth, to act in any fiduciary capacity in which trust companies organized under the laws of the Commonwealth are by such laws empowered to act; and, as provided therein, hereby certifies as follows:

One. Name of banking corporation.....

.....

Two. Date of incorporation or recharter.....

.....

Three. Location or place of business.....

.....

Four. Name, containing words "Trust Company," proposed to be used.....

.....

Five. Amount of capital stock paid in.....

Six. Copy of resolution of Board of Directors and date of adoption.....

.....

Seven. This certificate is made to enable the State banking company to obtain the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or habitual drunkards, or in any other fiduciary capacity in which trust companies organized under the laws of this Commonwealth have authority and are permitted under such laws to act.

Section 9. This certificate shall be acknowledged before a judge or notary public, which certificate, with acknowledgment certified and authenticated by the seal of such court or notary public, shall be transmitted, after approval by the Governor and Secretary of the Commonwealth, to the Commissioner of Banking to be filed, recorded, and preserved in his office.

Copies of such certificate, duly certified by the Commissioner of Banking and authenticated by the seal of office, shall be conclusive evidence in all courts of the Commonwealth of the right of said banking company to exercise the rights and privileges authorized by this act, and of every other matter or thing which could be proved by the production of the original certificate.

Section 10. The Commissioner of Banking, upon the receipt of the said certificate, if he approve the same, shall certify a copy of such certificate to the Governor, who shall, upon receiving the same, cause letters patent, under the great seal of the Commonwealth, to be issued to the said banking company under the corporate name as set forth in the certificate.

Section 11. Before application shall be made under the provisions of this act, the banking company shall cause a notice of such intended application to be adver-

tised in two newspapers printed in the county in which such corporate body is located, at least once a week, for three weeks, before such application shall be made, and the notice of such application shall specify the name and style, the location, the amount of capital and the purpose of the application. Proofs of such publication shall accompany the application.

Section 12. Every banking corporation acquiring the additional rights and privileges of this act, shall cause the letters patent to be record in the recorder's office of the proper county, shall adopt a corporate seal, and have succession by the name designated in its certificate for the term of twenty years from the date of its original incorporation or recharter. By its changed corporate name it may make contracts, sue, and be sued, complain, prosecute, and defend, in any court of law and equity or before any magistrate, as fully as natural persons, and shall have and possess all corporate powers under its original corporation or recharter, together with the rights and powers authorized by this act.

Section 13. All acts or parts of act inconsistent with this act be, and the same are hereby, repealed.

Approved—The 17th day of July, A. D. 1919.

WM. C. SPROUL.

Act of 1923, P. L. 173. Extending and enlarging the powers and rights of trust companies and banks organized and incorporated under the laws of the Commonwealth of Pennsylvania.

Section 1. Be it enacted, etc., That every trust company and bank organized and incorporated under the laws of the Commonwealth of Pennsylvania is hereby authorized and empowered to discount, buy, sell, negotiate, and assign promissory notes, drafts, bills of ex-

change, trade and bank acceptances, bonds, and other evidences of debt, and to receive and retain in advance interest on loans and discounts made.

Section 2. All acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

Approved—The 9th day of May, A. D. 1923.

GIFFORD PINCHOT.

23

FILED
APR 1 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1942

No. 790

MARY CABALIK,
Petitioner

vs.

JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company,
Respondent

BRIEF FOR RESPONDENT

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The Pittsburgh-American Bank and Trust Company was formed by the merger, under the Pennsylvania Merger Act of 1909, P. L. 408, of two banks originally incorporated under the Pennsylvania General Banking Act of 1876, P. L. 161, which act imposed a double liability on stockholders 2

In the light of this legislation and these court decisions are the stockholders of the Pittsburgh-American Bank and Trust Company now to be permitted to toss their liability to their depositors and creditors lightly aside on the theory that it is no longer enforcible against them? .. 6

Having accepted the benefits of the Banking Act of May 13, 1876, the stockholders are now estopped to deny their statutory liability 7

This relationship between the stockholders and the public being contractual in its nature, to now permit the stockholders to avoid their statutory obligation to the creditors of the company would be to destroy the protection which the federal Constitution throws about a contractual obligation in Article I, Section 10, thereof 9

There is a well established principle of law that the double liability once attached to the stockholders can not be destroyed by subsequent legislation 9

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I.

COUNTER-STATEMENT OF QUESTION INVOLVED

Can the enforcement of the rights of depositors and creditors against the stockholders of a banking corporation resulting from the merger of two corporations organized under the Pennsylvania Banking Act of 1876, P. L. 161—which imposes a double liability on stockholders—be declared unconstitutional as in conflict with the provisions of Section 1 of the XIV Amendment to the Constitution of the United States, solely because, subsequent to the organization of said constituent banks and the incurring by them of liabilities to depositors and creditors, the legislature of Pennsylvania enacted legislation granting similar banking powers to Corporations organized under the General Corporation Act of 1874, P. L. 73, which does not impose a double liability on stockholders?

II.

ARGUMENT

THE PITTSBURGH-AMERICAN BANK AND TRUST COMPANY WAS FORMED BY THE MERGER, UNDER THE PENNSYLVANIA MERGER ACT OF 1909, P. L. 408, OF TWO BANKS ORIGINALLY INCORPORATED UNDER THE PENNSYLVANIA GENERAL BANKING ACT OF 1876, P. L. 161, WHICH ACT IMPOSED A DOUBLE LIABILITY ON STOCKHOLDERS

The stockholders of the Roth's State Bank (which later had its name changed to Pittsburgh State Bank (R., p. 4a)) chose to incorporate under the Banking Act of 1876, P. L. 161, on the Sixth day of September, 1911, and began doing business with the general public on or about that date.

The stockholders of the American State Bank of Pittsburgh, Pa. (which later enlarged its banking powers to take on a trust business under the Pennsylvania Act of July 17, 1919, P. L. 1032 and changed its name to the American State Bank and Trust Company (R., p. 5a)) chose to incorporate under the same Banking Act of 1876 on the 14th day of September, 1920, and commenced doing business with the public on or about said date.

On or about June 11, 1931, under the terms of certain written Articles of Agreement bearing that date and pursuant to the authority of Letters Patent duly issued, the stockholders of the aforesaid banks merged their banking companies under the Merger Act of 1909, *supra*, and became

the Pittsburgh-American Bank and Trust Company (R., pp. 3a, 4a).

The Banking Act of 1876, P. L. 161, provided in Section 5 as follows:

> "The shareholders of any corporation formed under this Act, shall be individually responsible, equally and ratably, but not one for the other, for all contracts, debts and engagements of such corporation to the amount of their stock therein at the par value thereof in addition to the par value of such shares."

The stockholders of the constituent banks, which later merged to form the Pittsburgh-American Bank and Trust Company, became responsible for this statutory liability the moment they began doing business with the public. The Superior Court of Pennsylvania in *Harr, Secretary of Banking v. Boucher*, 142 Pa. Superior Court 114, 15 A. 2nd 699 (1940), has decided that this statutory liability is enforcible and that finding has been affirmed by the Supreme Court of Pennsylvania in this case.

Even the petitioner herein is willing to admit the constitutionality of the enforcement of this double liability at the time of its passage and up until the time certain enabling acts were passed extending the powers of corporations organized under the Pennsylvania General Corporation Act of 1874, P. L. 73 (See Petitioner's Brief, page 12).

It should be noted that Section 5 of the Banking Act of 1876, *supra*, contained this further provision:

> "That no corporation shall be organized under this act with a capital stock of less than fifty thousand dollars, divided into shares of not less

than fifty dollars each, which shall be deemed personal property and transferable on the books of the corporation in such manner as may be prescribed by the by-laws and articles of association thereof; and every person to whom stock shall be transferred as aforesaid, shall, in proportion to the shares received, succeed to all the rights and liabilities of the prior holders thereof, and *no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the corporation shall be impaired.*"

The statutory liability of banks organized under the Act of 1876 was never changed from May 13, 1876 until May 15, 1933—the date of the approval of the "Banking Code" of 1933. In the meantime William D. Gordon, the then Secretary of Banking, had taken possession of the business and property of the Pittsburgh-American Bank and Trust Company on the 25th day of September, 1931 (R., p. 8a).

In all of the legislation in Pennsylvania up until the date of this bank's closing there had never been any provision made to relieve the stockholders of a banking company of their statutory liability. On the contrary, there had been a continuous effort made by the Legislature of Pennsylvania to protect the rights of creditors and depositors.

As was said in Harr v. Boucher, *supra*, at page 121:

> "In authorizing the formation of banking companies by general and special acts the legislatures have held liable the stockholders of such institutions beyond their original investment long prior to 1876."

and several acts of that nature are listed in the footnotes on said page.

The Merger Act of 1909, *supra,* carried this provision in Section 3 thereof:

> "That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same."

and the Merger Agreement of June 11, 1931, *supra,* also contained the provision:

> "Provided that all rights of creditors and all liens upon the property of each of the constituent corporations shall continue unimpaired, limited in lien to the property affected by such liens at the time of the creation of the same, and the respective constituent corporations may be deemed to be in existence to preserve the same."

Even the Banking Code of 1933, P. L. 624, provided in Section 614:

> "As to deposits in, and claims outstanding against, banks, bank and trust companies, or trust companies, upon the effective date of this Act the liability of shareholders shall be as heretofore provided by law."

The Supreme Court of Pennsylvania in *Bell vs. Abraham,* 343 Pa. 169, has said:

> "We conclude therefore, that the clearly expressed legislative intent, in Section 614 of the Banking Code of 1933, to continue the prior law governing the liability of shareholders, including

the provisions of Section 5 of the Act of 1876, in force, without intermission, unless and until such liability may have been terminated in the manner provided, must be given effect, * * *."

IN THE LIGHT OF THIS LEGISLATION AND THESE COURT DECISIONS ARE THE STOCKHOLDERS OF THE PITTSBURGH-AMERICAN BANK AND TRUST COMPANY NOW TO BE PERMITTED TO TOSS THEIR LIABILITY TO THEIR DEPOSITORS AND CREDITORS LIGHTLY ASIDE ON THE THEORY THAT IT IS NO LONGER ENFORCIBLE AGAINST THEM?

It is to be noted that long before the Legislature of Pennsylvania had enacted the Act of May 9, 1923, P. L. 173, giving banking powers to trust companies, the banking companies in question had been transacting business with their depositors and creditors.

When, as stockholders of a bank of discount and deposit, they invoked the privilege of incorporating under the Banking Act of 1876 they elected to incur the obligations of a stockholder's liability under said Act. They did business with the public on this basis.

HAVING ACCEPTED THE BENEFITS OF THE BANKING ACT OF MAY 13, 1876, THE STOCKHOLDERS ARE NOW ESTOPPED TO DENY THEIR STATUTORY LIABILITY

In *Aultman's Appeal*, 98 Pa. 505, where the statutory personal liability of corporate stockholders to corporate creditors was involved, His Honor, Chief Justice Sharswood said at the bottom of page 512 and top of page 513:

> "It has been earnestly contended that the individual liability thus imposed on the stockholders is a penalty, and that the courts of one state will not enforce the penal laws of another. This is undoubtedly so; but was this liability thus provided for in any sense a penalty? The defendants became owners of their stock either by original subscription or by assignment from subscribers and assumed voluntarily all the obligations imposed upon them as owners. It was a contract, express or implied, to pay not only for the stock owned or subscribed but so much in addition as would be necessary for the purpose of securing the creditors of the company. This contract could be enforced in any state in which the defendants were amenable to the process of the courts."

There is a case cited by petitioner in her petition at page 6 as authority for this appeal—*Abie State Bank v. Bryan* (1930), 282 U. S. 765 (75 Law Ed. 690). An examination of that case eliminates it as authority for her contention here.

The "Bank Guaranty Law" of 1909 of the State of Nebraska which was under consideration in that case was

referred to by your Honorable Court as a police regulation, but a law authorizing the incorporation of a banking company and fixing the liabilities of its stockholders, as in the case at bar, is not a police regulation. As His Honor, Chief Justice Hughes said in that case at the bottom of page 706 of Law. Ed. No. 75:

> "*When money is deposited in bank, the contract that is made is between that bank and the depositor.* Notwithstanding the provisions of the Bank Guaranty Law there is, properly speaking, no contract between the depositor and other banks. The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while this was regarded as an important safeguard to all depositors, it was but a police regulation the sanction of which lay in the constitutional power of the State and not in contract."

Those words of the Chief Justice, indirectly, really affirm respondent's contention in this case—that here is a contractual obligation, express or implied, the enforcement of which is protected by the Federal Constitution.

THIS RELATIONSHIP BETWEEN THE STOCKHOLDERS AND THE PUBLIC BEING CONTRACTUAL IN ITS NATURE, TO NOW PERMIT THE STOCKHOLDERS TO AVOID THEIR STATUTORY OBLIGATION TO THE CREDITORS OF THE COMPANY WOULD BE TO DESTROY THE PROTECTION WHICH THE FEDERAL CONSTITUTION THROWS ABOUT A CONTRACTUAL OBLIGATION IN ARTICLE I, SECTION 10, THEREOF

THERE IS A WELL ESTABLISHED PRINCIPLE OF LAW THAT THE DOUBLE LIABILITY ONCE ATTACHED TO THE STOCKHOLDERS CAN NOT BE DESTROYED BY SUBSEQUENT LEGISLATION

In the case of *Irvine v. Elliott*, 203 Fed. Rep. 82 it was held that:

> "Where a stockholder of an insolvent Ohio Railroad Company acquired his stock prior to the adoption of a constitutional amendment November 3, 1903, relieving stockholders from the double liability imposed by Ohio Const. 1851 Art. 13, Section 3, the stockholder's liability was not affected by the amendment."

On page 96 of said Reports the Court further said, in discussing the effect of subsequent legislation:

> "The double liability of all the stockholders, non-resident as well as resident, clearly was established by Section 3258 of the Revised Statutes in connection with the constitutional provision of 1851, and was not and could not under the constitution of the United States be destroyed, lessened or impaired in the case of Elliott and

others who, by their acquisition of stock, contractually assumed and became subject to the double liability for the benefit of all creditors of the Railroad Company.

> "A statute can not relieve a stockholder of an insolvent corporation from his double liability in favor of creditors whose rights have become vested under the Constitution, or prior statutes of the state."

Blackburn vs. Irvine, 205 Fed. Rep. 217.

In the case of *George M. Ochiltree v. The Iowa Railroad Contracting Company*, 88 U. S. 249 (22 Law. Ed. 546), where, by the Constitution of Missouri, adopted in 1865, a liability to double the amount of their stock was imposed upon stockholders in private corporations and this provision was changed by the amended Constitution of 1870, so that the liability did not extend beyond the amount of subscribed and paid up stock, it was held—

> "Those who subscribed for stock while the old Constitution was in force were and remained liable under the double liability clause of the Constitution."

As the Court said:

> "The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself can not pay, the members who composed it at the time of the repeal are unaffected by it

and there is nothing in the way of subjecting them to the double liability provision."

We respectfully submit to your Honorable Court that the statutory liability imposed by the Pennsylvania Banking Act of 1876 as an incident of stock ownership in the constituent banks which were merged to form the Pittsburgh-American Bank and Trust Company is an obligation enforcible against the stockholders of said bank; that having invoked the privilege of incorporating under said Act and having done business with the public on this basis said stockholders are now estopped to deny their statutory liability; and that the relationship established between the stockholders of said bank and its depositors and creditors being contractual in its nature to now deny to the creditors of the company the right to enforce this statutory obligation against the stockholders would be to destroy the protection which the Federal Constitution has thrown about them.

Consequently, it is respectfully submitted, that the prayer of the petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 790.

MARY CABALIK, Petitioner,

v.

JOHN C. BELL, JR., Successor to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Pittsburgh-American Bank and Trust Company, Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

PRELIMINARY STATEMENT.

The purpose of this brief is to refute the argument urged by the Respondent that since the relationship between the stockholders and public is contractual in its nature, it is protected by the contract clause of the Federal Constitution.

II.

ARGUMENT.

Since the Assessment Is a Quasi Contractual Obligation Which Had Not Vested Prior to the Passage of the Act of 1923, Is the Relationship Protected by Article I, Section 10, of the Constitution of the United States?

The position of the Petitioner is that the liability of the stockholders of this corporation is *quasi* contractual, that the relationship had not vested when the Act of 1923, P. L. 173 was enacted by the legislature, (the passage of which act prevented enforcement of the assessment provisions of Section 5 of the Act of 1876 because of the prohibitions contained in Section 1 of the XIV Amendment to the Constitution of the United States) and that a *quasi* contractual relationship is not protected by the contract clause of the Federal Constitution, which protects only true agreements.

(a) *The assessment against stockholders of a corporation is a quasi contractual obligation.*

The Supreme Court of the United States has so held in the following decisions:

Mr. Justice Cardozo delivered the opinion in *Chisholm v. Gilmer*, 299 U. S. 99; 81 L. ed. 63 (1936). This was an action by the Receiver of a national bank to recover an assessment levied against a stockholder of the bank for double liability. At page 102 the Court states the relationship to be *quasi* contractual:

> "It is here sought to be applied, not in equity or admiralty (citing cases), but in a common law cause, a quasi-contractual obligation being the source of liability."

Coombes v. Getz, 285 U. S. 434; 76 L. ed. 866 (1931) was an action brought by the Receiver of a corporation to recover a liability by statute imposed upon directors. In a dissenting opinion Mr. Justice Cardozo defined the relationship as *quasi*-contractual. At page 449 he states:

> "If we put aside deceptive labels, borrowed from the law of quasi-contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (Crane v. Hahlo, 258 U. S. 142, 146, 66 L. ed. 514, 517, 42 S. Ct. 214), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors (compare Christopher v. Norvell, 201 U. S. 216, 225, 50 L. ed. 732, 736, 26 S. Ct. 502, 5 Ann. Cas. 740; Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. ed. 1163, 1174, 27 S. Ct. 755)."

(b) *The quasi contractual relationship had not vested when the Act of 1923, P. L. 173 was enacted.*

The right was contingent until the Secretary of Banking closed the bank and exercised his discretionary privilege of making the assessment on February 1, 1939 (Record 9 a). Moreover, nowhere in the record is it stated that any of the depositors of the bank at the time of its closing were depositors or creditors in 1923.

The discretionary right to assess and to sue is granted to the Secretary of Banking of the Commonwealth of Pennsylvania as Receiver by the express provisions of Section 723 of the Department of Banking Code of 1933; 1933 P. L. 565; 71 P. S. pocket parts, Section 733-723 at page 130. The Secretary of Banking as Receiver took possession of the Pittsburgh-American Bank & Trust Company on September 25, 1931 (Record 8 a). However, similar discretionary authority was

vested in the Secretary of Banking by the Banking Act of 1923, P. L. 809 at P. L. 826, Section 37.

It has been settled under a long line of cases that creditors of national banks have no right to sue. They must seek their remedy through the comptroller; they cannot proceed directly in their own names against stockholders of banks.

In *Kennedy v. Gibson, et al.,* 75 U. S. 498, page 505 (1869), it is stated:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected.
>
> "These questions are referred to his judgment and discretion, and his determination is conclusive."

At page 506:

> "* * * creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

The above seems to be a leading case and is cited and approved and the following language used in *Broderick v. Rosner,* 294 U. S. 629; 79 L. ed. 1100 (1934), at page 647 where it is stated:

> "* * * it has been settled by an unbroken line of authorities beginning with Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. ed. 476, 478, that the Comptroller's determination is conclusive in an action at law to enforce the stockholder's liability; being subject, like other administrative orders, only to a direct attack for fraud or error of law by appropriate proceedings in equity."

It is respectfully submitted that the same reasoning which applies to the Comptroller under the National Banking Act applies with equal force to the Secretary of Banking of Pennsylvania. The creditors of a closed Pennsylvania bank have no right to sue a stockholder directly; the right to sue is in the Secretary of Banking and that right is not mandatory but discretionary, and by reason thereof creditors have no vested rights in Pennsylvania against stockholders of closed banks.

The Act of 1923, P. L. 809, Section 37, at P. L. 826, reads as follows:

> "Section 37. Enforcement of Individual Liability of Stockholders.—Whenever the stockholders of a corporation whereof the secretary shall have taken possession are liable, in addition to their liability as such stockholders for unpaid subscriptions, to an amount equal to the par value of their stockholdings in such corporation, and the secretary has determined from his examination of the affairs of the corporation that the reasonable value of its assets is not sufficient to pay its creditors in full, he *may enforce* the individual liability of such stockholders to such extent as may be necessary.
>
> "If *he determines to enforce such liability,* he shall make demand, * * *" (Italics supplied).

Therefore, the quasi contractual obligation in the case at bar was not a vested right. It will be noted that Respondent cites only cases where the right had vested.

(c) *Article I, Section 10, Clause 1 of the Constitution of the United States protects only true agreements and not contingent quasi contractual relationships.*

That portion of the Federal Constitution pertaining to the impairment of contracts which appears in Article I, Section 10, Clause 1 of the Federal Constitution, U. S. C. A. part 2, page 4 and page 31 is as follows:

> "No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or law impairing the Obligation of Contracts or grant any Title of Nobility."

Mr. Justice Cardozo in a portion of his dissenting opinion in *Coombes v. Getz, supra,* which portion of the opinion is not at variance with the majority opinion, clearly states and supports by the citation of cases the legal provision that the contract clause of the Federal Constitution is aimed at true agreements and not at quasi-contracts as distinguished from agreements implied in fact unless the quasi contract has become a vested right. At page 450 we find:

> "The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact (Crane v. Hahlo, 258 U. S. 142, 146, 66 L. ed. 514, 517, 42 S. Ct. 214; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 288, 27 L. ed. 936, 937, 3 S. Ct. 211)."

Since the relationship in the present case is quasi-contractual and was contingent in 1923, it is not protected by the contract clause of the constitution.

Respectfully submitted,

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